Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
RingCentral, Inc. Petition for Expedited Declaratory Ruling	)	
	)	

Anderson + Wanca's Comments on RingCentral Inc.'s Petition
For Expedited Declaratory Ruling

Anderson + Wanca ("A+W") submits these comments on the Petition for Expedited Declaratory Ruling filed by RingCentral, Inc. ("RingCentral").[1] A+W is an Illinois law firm that represents clients in private litigation under the Telephone Consumer Protection Act of 1991 ("TCPA"). A+W is not counsel in the private TCPA action against RingCentral, but A+W submits these comments because a ruling on the Petition could have implications beyond RingCentral's case. The Consumer & Governmental Affairs Bureau sought comments on RingCentral's Petition on July 29, 2016.[2] As argued below, the Commission should deny the Petition in its entirety.

I. RingCentral's attacks on Rule 64.1200(f)(10) are time-barred.

RingCentral argues that Rule 64.1200(f)(10), defining "sender" as "person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or

[1] *RingCentral, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (July 6, 2016) ("Petition").

[2] *Consumer & Governmental Affairs Bureau Seeks Comment on RingCentral, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (July 29, 2016).

services are advertised or promoted in the unsolicited advertisement," is invalid because (1) it "violate[s] the TCPA's statutory text" and (2) it was issued without an adequate "notice and comment rulemaking proceeding."[3] Both arguments are time-barred.

RingCentral's argument that the Commission lacked statutory authority to issue Rule 64.1200(f)(10) is an "improper collateral challenge[]" that should have been brought in a timely petition for reconsideration under 47 U.S.C. § 405(a) and Rule 1.429(d) and is therefore "time-barred by the Commission's rules."[4] The "sender" definition was issued in the 2006 Order, along with a suite of regulations implementing the Junk Fax Prevention Act of 2005 ("JFPA").[5] The rules were published in the Federal Register May 3, 2006,[6] and became effective August 1, 2006.[7] RingCentral did not file its petition challenging the validity of the rule until July 6, 2016, a full decade after expiration of the 60-day deadline following publication in the Federal Register.

Similarly, RingCentral's argument that there was a procedural defect in the adoption of Rule 64.1200(f)(10) is also time-barred because "challenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement

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[3] Pet. at 22–23.

[4] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 13998, 14005 (rel. Oct. 30, 2014).

[5] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3822 (rel. Apr. 6, 2006) ("2006 Order").

[6] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967-01 (May 3, 2006).

[7] *See Consumer & Governmental Affairs Bureau Announces Aug. 1st Effective Date of Amended Facsimile Advert. Rules*, 21 FCC Rcd. 8627 (CGAB July 27, 2006)

proceeding, will not be entertained outside the 60-day period provided by statute."[8] Here, RingCentral has not even raised its procedural challenge in a petition for "amendment or rescission" of the Rule, but even if it had, the Petition would be time-barred.

II. There is no controversy to decide because the Commission's rules are unambiguous.

RingCentral's Petition raises no "controversy" or "uncertainty" for the Commission to resolve, as required by Rule 1.2.[9] The Petition raises no ambiguity regarding the meaning of "sender" in Rule 64.1200(f)(10) or the meaning of "advertisement" in Rule 64.1200(f)(1), and there is no basis for the notion that one sender can "piggyback" on another sender's "prior express invitation or permission."

A. The Petition presents no ambiguity over the definition of "sender."

Rule 64.1200(f)(10) states: "The term sender for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." There is nothing ambiguous about this rule. A person or entity is a "sender" if (1) the fax is sent "on its behalf" or (2) its "goods or services" are advertised. Since the regulation is unambiguous, and RingCentral has not petitioned to amend or repeal it, the Petition for Declaratory Ruling requires no further action.

The Commission has had no difficulty in applying the "sender" interpretation. In its amicus letter before the Eleventh Circuit in *Sarris*, the Commission stated that "under

[8] *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (emphasis in original).

[9] 47 C.F.R. § 1.2.

the plain text of that definition . . . direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the 'sender') whose goods or services are being promoted, and *not* generally to the entity that physically transmits the facsimile."[10] The Commission emphasized that "so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant's goods or services" the regulation means what it says and the person "*whose goods or services are advertised or promoted in the unsolicited advertisement*" is directly liable.[11]

The courts that have applied Rule 64.1200(f)(10) in private TCPA litigation in cases involving faxes sent after the August 1, 2006 effective date[12] have also found no ambiguity. In *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 635 (6th Cir. 2015), faxes advertising the defendant's restaurant were sent in November and December 2006. The Sixth Circuit held the regulation means what it says, noting the "FCC regulations are explicit that the party whose goods or services are advertised . . . is the sender" and holding that the defendant was "directly liable" because the faxes advertised its restaurant. *Id.* at 637.

[10] Commission Amicus Letter, *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, No. 13-14013 (11th Cir.), at 2014 WL 3734105, at *5 (OHMSV July 17, 2014).

[11] *Id.* (emphasis in original).

[12] The faxes at issue in *Sarris* were sent in 2005, and the court expressly did not apply Rule 64.1200(f)(10), noting, "this regulation was not promulgated until after [plaintiff's] cause of action accrued in 2005." *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1284 & n.7 (11th Cir. 2015). Similarly, *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 939 (7th Cir. Mar. 21, 2016), involved faxes sent "on June 27 and June 28, 2006." *Bridgeview Health Care Ctr. Ltd. v. Clark*, 2013 WL 1154206, at *1 (N.D. Ill. Mar. 19, 2013).

In *Arkin v. Innocutis Holdings, LLC*, the district court applied the plain language of the regulation to faxes sent after August 1, 2006, holding the defendant was a "sender" because its "goods are advertised or promoted in the Fax."[13] And in *Addison Automatics, Inc. v. RTC Grp., Inc.*, the court applied the regulation to faxes sent in 2009, holding that "[s]ince [the defendants'] goods or services are advertised in the fax at issue, they are 'senders' under the FCC's interpretation of this section of the TCPA."[14]

RingCentral raises the specter of "sabotage liability," where a person with "malicious intent" sends faxes advertising the goods or services of a person or entity who "had [nothing] to do with" the faxing.[15] But RingCentral provides no example of this scenario ever actually happening. It certainly did not happen to RingCentral, which had everything "to do with" the inclusion of its advertising on its customers' faxes. According to its Petition, RingCentral created the template cover sheets and made them available for use. Far from being "sabotaged," it appears RingCentral's customers used that template in precisely the manner RingCentral intended.

B. The Petition presents no ambiguity in the definition of "advertisement."

The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in

[13] 2016 WL 3042483, at *5 (M.D. Fla. May 26, 2016).

[14] 2013 WL 3771423, at *4 (N.D. Ill. July 16, 2013).

[15] Pet. at 20.

writing or otherwise."[16] The Commission's rules define "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services."[17]

RingCentral argues there is a "de minimis exception" to this definition, but that is a misreading of the Commission's prior rulings. The only use of the term "de minimis" in the 2006 Order is in the section discussing "transactional communications," where the Commission stated that, if a communication has *already* been established to be a non-advertising "transactional communication," then a "*de minimis* amount of advertising information," such as "a company logo or business slogan found on an account statement" will not "convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient."[18]

Similarly, the 2006 Order states that "bona fide informational communications," such as "industry news articles, legislative updates, or employee benefit information," are non-advertisements and that "incidental advertising" in such a non-advertisement will not convert the communication into an advertisement, *provided that* its "primary purpose is informational, rather than to promote commercial products."[19]

[16] 47 U.S.C. § 227(a)(5).

[17] 47 C.F.R. § 64.1200(f)(1).

[18] 2006 Order ¶ 51.

[19] 2006 Order ¶ 53 & n.187.

RingCentral does not claim that the faxes at issue in its underlying litigation are "transactional communications" or a "bona fide informational communications."[20] Instead, RingCentral asks the Commission to create a "de minimis" exception "for all fax messages[,] including those that are informational [or] transactional as well as those that contain separate and impermissible unsolicited advertisements."[21] Thus, RingCentral is asking the Commission to twist the rule that a non-advertisement is not converted into an advertisement by inclusion of "incidental" advertising information to create a rule that *an advertisement* is converted into a *non-advertisement* through inclusion of incidental advertising. There is no basis for such a rule. RingCentral admits the faxes at issue are advertisements. RingCentral disputes whether the faxes advertise *its* "goods or services," making it the "sender" under Rule 64.1200(f)(10), but that is a separate consideration.

C. There is no ambiguity that "prior express invitation or permission" is not transferrable.

RingCentral seeks a ruling that it may rely on "consent" obtained by its customers using its fax-broadcasting service to "piggyback" its advertisements on its customers' faxes.[22] At the outset, the TCPA does not recognize "consent" to facsimile transmissions. Although the TCPA provisions governing telephone calls allow a defense of "prior express consent,"[23] the fax-advertising rules recognize only EBR and "prior express

[20] Pet. at 1–35.

[21] *Id.* at 28–29.

[22] *Id.* at 29.

[23] 47 U.S.C. § 227(b)(1)(A) (prohibiting telephone calls "using any automatic telephone dialing system or an artificial or prerecorded voice" without the called party's "prior express consent").

invitation or permission."[24] As the Commission explained as amicus in *Sarris*, and as the Eleventh Circuit accepted,[25] "[s]eparate subsections of the statute address voice telephone calls and facsimile advertisements" and "FCC rules implementing those provisions treat voice calls and faxes differently."[26]

RingCentral is clearly mistaken that one sender can "piggyback" on another sender's "prior express invitation or permission." That would, at best, constitute *implied* permission. The Commission's rulings are clear that, in order to carry its burden of proof, a sender must demonstrate that the recipient understood that "by providing such fax number, the individual or business agrees to receive facsimile advertisements *from that company or organization*."[27] The courts agree.[28] Even in TCPA call cases, "express consent" cannot be transferred.[29]

Conclusion

RingCentral's Petition presents no "controversy" or uncertainty with respect to the Commission's unambiguous rules. If the Commission decides to issue a declaratory

[24] 47 C.F.R. § 64.1200(a)(4).

[25] *Sarris*, 781 F.3d at 1255.

[26] *Sarris* Amicus Letter, 2014 WL 3734105, at *1.

[27] 2006 Order ¶ 45 (emphasis added).

[28] *See, e.g., Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 484 (W.D. Mich. 2014) (holding permission was at best "indirect," and not *express*, where physician gave fax number to AMA, which then licensed database to third parties).

[29] *See Satterfield v. Simon & Schuster*, 569 F.3d 946, 955 (9th Cir. 2009) (plaintiff's "consent to receive promotional material by Nextones and its affiliates and brands cannot be read as consenting to the receipt of Simon & Schuster's promotional material").

ruling, it should reaffirm that the TCPA is a "remedial statute," and any ambiguity should be broadly construed to protect consumers.[30]

Dated: August 29, 2016

Respectfully submitted,

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[30] *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7993 ¶ 56 (July 10, 2015) (citing with approval *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013)); *see also Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 327 (3d Cir. 2015) (where there are equally plausible "proposed interpretations" of the TCPA, the scales "tip in [the consumer's] favor").